IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KAREN LOWY, individually and as parent and next friend of N.T.; ANTONIO HARRIS, Plaintiffs-Appellants, v. DANIEL DEFENSE, LLC; FAB DEFENSE, INC.; FAB MANUFACTURING & IMPORT OF INDUSTRIAL EQUIPMENT LTD.; BRAVO COMPANY USA, INC.; LOYAL 9 MANUFACTURING, LLC; FOSTECH, INC.; HEARING PROTECTION, LLC; CENTURION ARMS, LLC; MAGPUL INDUSTRIES CORP.; FEDERAL CARTRIDGE COMPANY; VISTA OUTDOOR, INC.; FIOCCHI OF AMERICA, INC.; FIOCCHI MUNIZIONI S.P.A.; SUREFIRE, LLC; TORKMAG, INC., Defendants-Appellees, and STARLINE, INC.; JOHN DOES 1–20, Defendants.	Case No. 24-1822

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MATERIAL

The Court should deny Plaintiffs' motion for leave to file a hearing transcript from an unrelated state trial court proceeding. Plaintiffs did not present this transcript to the district court, and they seek to use the transcript to smuggle in new factual

allegations that appear nowhere in the operative complaint. The Court cannot consider the transcript as part of this appeal from a grant of a motion to dismiss, so the motion for leave to file the transcript should be denied.

Local Rule 28(b), which Plaintiffs' motion invokes, allows a party to file "a motion for leave" if it wishes to add "supplemental material" to the record. L.R. 28(b). But Local Rule 28(b) does not supply the legal standard to decide such motions. The permissible reasons for supplementing the record are contained elsewhere in the Federal Rules, and the Plaintiffs fail to satisfy any of them.

Federal Rule of Appellate Procedure 10(a) states that the record on appeal shall consist of "the original papers and exhibits filed in the district court," "the transcript of proceedings" in the case, and "a certified copy of the docket entries prepared by the district clerk." FED. R. APP. P. 10(a). The transcript of a hearing in a previous, unrelated state-court case is none of those things. Most importantly, this transcript was not part of "the original papers and exhibits filed in the district court." *Id.* The hearing took place before this lawsuit was filed, but Plaintiffs made no effort to submit the transcript to the district court.

Rule 10(e), which permits some additions to the record, is inapplicable here. That Rule allows a "correct[ion]" of an "omission or misstatement" in the record made by an "error or accident" to be fixed on appeal. FED. R. APP. P. 10(e)(2). But Plaintiffs do not claim that their failure to present the *Green* transcript to the district

court was an excusable "error or accident." *Id.* This Court takes Rule 10(e)'s limitations seriously and has recently denied a similar motion to supplement the record because the material did not fall under the text of Rule 10(e). *See United States v. Heyward*, 42 F.4th 460, 467 n.3 (4th Cir. 2022).

Instead of relying on the avenue laid out in Rule 10(e), Plaintiffs attempt to shoehorn the transcript into the record under Local Rule 32.1(b), which requires that "[i]f a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." L.R. 32.1(b). But that Rule has no application here. A transcript of a hearing is not an "opinion, order, judgment, or other written disposition." *Id.* Indeed, it is not even like those things. Each item on the list references a dispositional document; a document that relays a legally binding order. But this transcript involves no decision whatsoever. *Id.* So not only does this transcript fall outside of the plain text of the rule, but it also cannot be fairly deemed as equivalent to the examples listed in the rule's text.

Plaintiffs next contend that the transcript is simply a part of the public record that can be judicially noticed like "publicly available population statistics." Pls.' Mot. for Leave to file Suppl. Material, Doc. 66-1 at 2 (Oct. 28, 2024); *see* FED. R. EVID. 201. That argument is misleading. Judicial notice is only appropriate to

establish "the existence" of another court's proceedings. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Yet Plaintiffs' brief shows that they seek to use this document for the *truth* of an offhand remark made by a judge during oral argument. Specifically, Plaintiffs are attempting to make up for their failure to plead any facts to support their argument that a magazine is not a "component part" of an AR-15 by citing to a state trial judge's statement that:

> I may be the type of person that wants to fire one single bullet, check how it fired. Go downrange, check it out, bring back. Fire one single bullet and do it on and on again and, for example, there, it allows me to use the gun exactly how the manufacturers set it to be used. I'm firing the gun. I don't need a magazine to do any of that.

Appellants Br., Doc. 64 at 45 (Oct. 28, 2024). Plaintiffs cannot amend their complaint on appeal by introducing a hearing transcript from another case in which a judge speculates about whether an AR-15 could be fired without a magazine consistent with "how the manufacturers set it to be used."[1] *Id.* If Plaintiffs wanted to make this point, they needed to include it in their complaint and present it to the district court in the first instance, which they most certainly did not.

[1] Because Plaintiffs are attempting to use this transcript for an improper purpose, the Court should "decline to exercise any inherent equitable authority to supplement the record on appeal [the Court] may have beyond the scope of" the federal rules. *Heyward*, 42 F.4th at 467 n.3 (quotation marks omitted). Additionally, it does not appear that this Court has decided whether this authority exists, and a motion where the movant does not even invoke inherent equitable authority would be an inopportune time to do so.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the length limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 913 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: November 12, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2024, a true and accurate copy of the foregoing response was filed electronically with the Clerk of the Court and served on counsel of record using the CM/ECF system.

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